

WILEY, REIN & FIELDING

1776 K STREET, N.W.
WASHINGTON, D. C. 20006
(202) 429-7000

PETER D. O'CONNELL
OF COUNSEL
(202) 429-3350

RECEIVED

FACSIMILE
(202) 429-7049

December 11, 1998

DEC 11 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CS Docket No. 98-201; RM Nos. 9335 and 9345

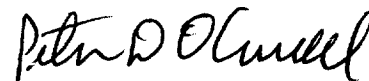
Dear Ms. Salas:

Enclosed herewith, on behalf of Lee Enterprises, Incorporated, are an original and eight copies of the **COMMENTS OF LEE ENTERPRISES, INCORPORATED** in response to the Notice of Proposed Rulemaking, FCC 98-302, in the above referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned. Thank you for your attention.

Sincerely,

WILEY, REIN & FIELDING



Peter D. O'Connell

PDO:rm

Enclosures

cc (on diskette): Mr. Don Fowler, Cable Services Bureau
International Transcription Service, Inc.

No. of Copies rec'd 0+8
List ABCDE

ORIGINAL

RECEIVED

DEC 11 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Satellite Delivery of Network Signals)	CS Docket No. 98-201
to Unserved Households for Purposes of)	RM No. 9335
the Satellite Home Viewer Act)	RM No. 9345
)	
Part 73 Definition and Measurement)	
of Signals of Grade B Intensity)	

COMMENTS OF LEE ENTERPRISES, INCORPORATED

Lee Enterprises, Incorporated ("Lee"), by its attorneys, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-referenced proceeding. As operator of sixteen television stations, including stations that are affiliated with the major networks, Lee provides free over-the-air programming to thousands of people in ten DMAs.¹ These comments strongly oppose any change in the definition of the Grade B intensity contour that could affect the stations' ability to provide local television programming to their viewers.

¹ Lee is the licensee of television stations WSAZ-TV, Huntington, WV; KGMB-TV, Honolulu, HI; KGMD-TV, Hilo, HI; KGMV-TV, Wailuku, Maui, HI; KGUN-TV, Tucson, AZ; KMTV-TV, Omaha, NE; KMAZ-TV, Las Cruces, NM. Lee is also the controlling owner of the licensees of television stations KOIN-TV, Portland, OR; KRQE-TV, Albuquerque, NM; KBIM-TV, Roswell, NM; KREZ-TV, Durango, CO; KSNW-TV, Wichita, KS; KSNG-TV, Garden City, KS; KSNC-TV, Great Bend, KS; KSNK-TV, McCook, NE; and KSNT-TV, Topeka, KS.

The 1988 Satellite Home Viewers Act (“SHVA”), 17 U.S.C. § 119 (1998), defines an “unserved” household that is entitled to receive DBS feeds of distant network stations’ programming as a household that cannot receive a “Grade B” signal. Under the FCC’s current rules, a Grade B signal is one of a prescribed field strength, depending on channel, which produces an acceptable picture that can be received by at least fifty percent of the audience ninety percent of the time.² The Notice proposes to redefine this standard to reflect reception by fifty percent of the audience more than ninety percent of the time.³ While this proposal does not equate the Grade B to Grade A signal strength (Grade A is reception of an acceptable signal by seventy percent of the audience ninety percent of the time), and it falls short of the even more draconian 99% and 100% reception proposals of EchoStar and the NRTC, there is no question that redefining a Grade B signal to the new standard would drastically affect the categorization of local television station audiences, as shown in comments submitted in response to the earlier NRTC and EchoStar Petitions.⁴

The expanded definition of “unserved household” resulting from the changes in measuring Grade B signal strength, as proposed by the Notice, EchoStar and the NRTC, defies and distorts Congress’ expressed intent in adding the “white area” exception to the SHVA. In keeping with fundamental tenets of copyright law (and the SHVA is, in fact, part of the

² 47 C.F.R. § 73.683(a); see also *CBS, Inc. v. Primetime 24 Joint Venture*, 9 F.Supp.2d 1333, 1339 (S.D. Fla. 1998) (“[T]he plain language of the [SHVA] adopts the FCC’s definition of a grade B signal (an objective test) to determine whether a household is an ‘unserved household.’”)

³ Notice at ¶ 32.

⁴ See, e.g., NAB Echostar Comments at 2.

Copyright Act), Congress tried to keep the DBS compulsory license narrowly confined. Thus, the statutory limitations on the license were lifted to cover only “*a small percentage of television households* [that] cannot now receive clear signals embodying the programming of the three national television networks.”⁵ No question exists that in making this statement, members of Congress were relying on the current FCC standard for Grade B service, not some undefined variant thereof. Moreover, it is incongruous to suggest that Congress’s efforts to foster the development of the DBS service to provide competition to cable companies that have abused their monopoly power should come at the expense of our system of free, over-the-air broadcasting.

I. Satellite Providers Have Acted in Bad Faith By Knowingly Transmitting Distant Network Signals to Customers in Served Households; They Should Not Be Rewarded by the Commission for Their Illegal Activities.

Satellite providers appear before the Commission in this proceeding with unclean hands. By filing the Petitions which, in part, initiated the Notice, satellite providers are boldly attempting to provide cover for their own violations of the SHVA by arguing that the FCC’s long-standing definition of Grade B signal -- and not their own illegal practices -- will force some satellite consumers to lose access to network television broadcasts.

Instead of simply complying with the SHVA, satellite providers have sought to create pressure for a new definition of the Grade B signal by patently ignoring the law. Satellite providers signed up households to receive distant network signals not on the basis of the residents’ actual inability to receive an adequate Grade B signal as prescribed by the SHVA, but

⁵ H.R. Rep No. 100-887, pt. 1, at 18 (emphasis added).

by using consumers' self-reported and unverified claims of inability to receive an adequate over-the-air network signal.⁶ In such circumstances, it is irrational and destructive to consider changing the law to legitimize satellite providers' actions, rather than to insist that those actions conform to the law.

Broadcasters are not unsympathetic to the plight of DBS subscribers who face the prospect of having network signals cut off. Stations have and will continue to work on a case-by-case basis with subscribers who truly do not receive an adequate network signal. The proposals advanced in this proceeding, however, would redefine the Grade B contour so as to impact not only these "fringe" subscribers, but also any number of viewers who receive strong over-the-air signals. Were the Commission to accede to DBS providers' requests, the Commission would be establishing the dangerous precedent that agency "bail outs" are available to protect industries who defiantly engage in illegal activities. The Commission should instead make every effort to facilitate a regime of regulation that would allow the consumer to receive local broadcast signals and not allow satellite providers to benefit from their own scofflaw behavior.

II. Local Broadcasters Provide a Unique Service to The Community That Will be Jeopardized by Any Redefinition of Served Households.

Local broadcasters provide a unique service to their communities by providing a free source of news and information about local events and topics of local interest. This service includes not only community-specific newscasts, but important information concerning local

⁶ See *Primetime 24 Joint Venture*, 9 F.Supp.2d at 1337.

emergencies, school closings, food drives, blood drives, consumer alerts, public affairs and community events. Local broadcasts are a significant means through which viewers can stay “in tune” and contribute to the sense of community within the areas in which they live.

Broadcasters gain financial advertising support for these vital services in proportion to the number of households that receive an over-the-air signal in different areas of their DMA. For areas with a large number of served households, community specific local news and information is more readily available and in-depth. On the other hand, for areas where fewer viewers can receive the local over-the-air broadcasts, stations have a reduced economic incentive to schedule local programming, and they predictably devote less news coverage to such areas.

The SHVA grants DBS providers a special copyright license to transmit distant network signals that do not contain local stations’ valuable news and public affairs services. While distant network signals are concededly better than no signal at all, local broadcast signals clearly provide the highest value service to households within their markets. Should the Commission accept a more expansive definition of unserved households under the SHVA and allow DBS providers to transmit distant network signals to households that can routinely receive local signals with a suitable antenna,⁷ local programming and information available to all households in many communities will be reduced to the extent that audiences in those communities are

⁷ The Notice also requests comment on the methodology for measuring signal strength at individual locations. In this regard, Lee takes issue with testing procedures proposed by EchoStar and described in the Notice at ¶¶ 37-39. Specifically, to assume that most rooftop antennas are not equipped with rotor capability or to assume that viewers are unwilling to or incapable of changing an antenna’s direction appears unrealistic. Nor is it reasonable to base the standard on the lowest quality equipment or the most egregious signal attenuation due to use of an excessive number of splitters.

eroded. With losses of audience volume and corresponding losses of advertising revenues, not only will the households that subscribe to satellite delivery systems be deprived of available local service, but that service will be reduced for all households in the redefined communities. It follows that the definition of unserved households should be as realistic as possible, to favor the potential reception of local network signals and programming, in preference to a compulsory license for distant network signals when such reception is not truly needed.

II. No New Rule Should Be Adopted in View of Proposed Congressional Action to Impose a More Effective Solution.

As a result of recent technological advances, so-called “local-into-local” distribution of network signals will soon afford a more effective, fairer means of incorporating broadcast network programming into the service packages being received by DBS subscribers. While legislation to provide “local-into-local” service failed to reach a full vote in 1998,⁸ House Commerce Committee Chairman Bliley (R-Va) and Senate Commerce Committee Chairman McCain (R-Ariz.) are committed to reintroducing this legislation in the next session.⁹

To DBS providers’ apparent dissatisfaction, the recent legislative proposals would require satellite providers to carry, upon request, all non-duplicative broadcast signals located within the relevant local market in order to qualify for such a compulsory license. This solution represents

⁸ See H.R. 2921 (1998); S. 2494 (1998).

⁹ See 144 Cong. Rec. E1999 (Sept 10, 1998) (“I [Bliley] just would like to state for the record, my firm commitment to revisiting and resolving these issues in a comprehensive manner early next year...”); *Statement of Senator John McCain Chairman, Senate Committee on Commerce, Science, and Transportation: Full Committee Hearing on S. 2494, The Multichannel Video Competition Act of 1998* (October 1, 1998).

the current equilibrium point in a delicate legislative process which must balance the interests of broadcasters, satellite carriers, cable providers, and the public. While it is unclear at the present time exactly where the ultimate balance will be struck, the Commission should refrain from taking any action at this time that would preempt or prejudice Congress' ultimate ability to craft a solution.

In Lee's view, "local-into-local" would equitably solve the problem of network programming availability and would have the added advantage of making broadcasters' local news and public service programming, including local emergency warnings and information, as well as local political announcements and information available to all DBS subscribers. In addition, "local-into-local" would preserve the economic integrity of the system of broadcasting that has served the country so well for so many years and would create a truly level playing field among DBS, over-the-air broadcasting and terrestrially-based multi-channel video distributors (such as cable operators and wireless cable systems), creating the competitive markets that Congress envisioned in the Telecommunications Act of 1996. A "local-into-local" approach also would be consistent with the Commission's existing rules applicable to cable TV, which are designed to foster a network affiliation system that assumes exclusivity within the relevant station service area. *See, e.g.*, 47 C.F.R. § 76.92 (1997) (cable system may not carry duplicative non-local network programming upon request of the local affiliate with network non-duplication rights); 47 C.F.R. §§ 76.151, 76.153 (1997) (cable system may not carry duplicative non-local syndicated programming upon request of a program supplier or a local station with exclusive rights).

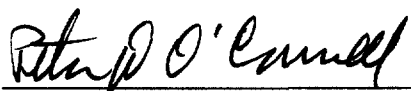
Lee will support legislation to amend the SHVA to provide for "local-into-local" distribution, with appropriate must-carry and retransmission consent rights for local stations.

Indeed, it is only fair that in exchange for their valuable copyright license DBS providers should be willing to accept those obligations which apply to their competing distribution media. Rather than advancing the long-term interests of consumers, the precipitous adoption of modified Grade B reception standards could have the unfortunate effect of impeding prospects for a truly effective legislative solution.

For the foregoing reasons, Lee urges that the Commission (i) refrain from altering the current Grade B standard; and (ii) reject suggested revisions to individual measurement procedures at least until Congress has had ample opportunity to consider local-into-local legislation. In the alternative, the Commission should craft rules which would guarantee the greatest possible local service to households and allow distant signal retransmission only where local service is truly unavailable.

Respectfully submitted,

LEE ENTERPRISES, INCORPORATED

By: 
Peter D. O'Connell
Kathleen A. Kirby

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006
(202) 429-7000

Its Attorneys

December 11, 1998